INTERIOR BOARD OF INDIAN APPEALS

Estate of Daniel J. Pierre

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATE OF DANIEL J. PIERRE

IBIA 76-TQ-4 Decided January 28, 1977

Appeal from an order denying petition for rehearing.

Reversed and Remanded.

1. Indian Probate: Wills: State Law: Applicability to Indian Probate, Testate

   A power of appointment is a power of disposition given to a person or persons over property not their own, by someone who directs the mode in which that power shall be exercised by a particular instrument. It is an authorization to do an act which the owner granting the power might himself by law fully perform.

2. Indian Probate: Wills: State Law: Applicability to Indian Probate, Testate

   A power of appointment included in a purported Indian will concerning trust allotments or restricted personal property is not valid unless first approved by the Secretary of the Interior or his duly appointed subordinate.

APPEARANCES: Harry L. Johnsen, Esq., for appellants; Earl K. Nansen, Esq., for appellees,

OPINION BY ADMINISTRATIVE JUDGE SABAGH

Agnes Pierre Cohen and Andrew Pierre, children of decedent, Daniel J. Pierre, enrolled Colville Indian, appeal from an order of Administrative Law Judge Robert C. Snashall denying petition for rehearing on approval of Will dated November 4, 1957, and Decree of Distribution of April 30, 1975.

In said Order and Decree of Distribution, Judge Snashall concluded among other things that the decedent's Last Will and Testament dated November 4, 1957, be, and the same is, approved and the Superintendent of the Colville Indian Agency shall, after costs of administration and subject to allowed claims cause to be made a distribution of the trust estate in accordance with said Last Will and Testament as devised and bequeathed in clauses: four (to Ben Sloan and Clint Lilly [non-trust]) and as described in the estate inventory. By clause three, testator directs that a debt due Ben Sloan and Clint Lilly in the sum of $950 be paid; since the two named creditors are also the sole devisees of the estate, their claim and inheritance merge, eliminating special consideration of the claim.

The grounds for appeal in substance are:

1) The Administrative Law Judge in his Order Approving Distribution did not include a Finding of Fact and Conclusion of Law on a) whether the Will of November 4, 1957, was in fact a security agreement and b) how the Judge determined the decedent was married at the time of his demise.

2) The Judge erred in approving the Will of November 4, 1957.

3) The Judge erred in approving the residual clause of the Will in that it attempts to create a private trust in an Indian allotment.

Decedent, Daniel J. Pierre, an enrolled Colville Indian, made a will on March 11, 1953, naming his son Andrew Pierre as sole beneficiary of the following trust property:

> My undivided 4/6 interest in Alex Pierre, Dec'd, S-2365.
>
> My sole interest in the Lena Pierre Allot. S-858(ALL).
>
> My undivided ½ interest in Alexander, Dec'd. C-149).
>
> My undivided 1/21 interest in Chief Antoine, Dec'd. C-242.
>
> My undivided interest (1/3) in Angeline Peone Pierre, Dec'd, C-165.

In 1955 the decedent leased his interest in the Lena Pierre Allotment referred to, supra, and described as S 1/2 NW 1/4, NW 1/4 SW 1/4, Sec. 11, T. 33 N., R. 27 E., Willamette Meridian, Washington, containing 120 acres, to Ben Sloan and Clint Lilly. The lease was approved by the Bureau of Indian Affairs, and apparently renewed from time to time through December 22, 1973, date Daniel J. Pierre died. The lease fees were paid into the Bureau of Indian Affairs.

The lessees advanced or loaned the decedent money at certain intervals to 1957. On or about November 4, 1957, the decedent approached the lessees for further loans. The lessees refused unless they were given some form of security. Whereupon decedent suggested that he make a will. Lessees accompanied the decedent to the office of their attorney in Bridgeport, Washington, and were present while the will was drafted and executed. It further appears that lessees paid the attorney for his services in preparing the will and they retained the original of said will.

Lessees testified that they made periodic loans to decedent subsequent to the execution of said will, mostly in cash aggregating approximately $6,000 to December 22, 1973. Coincidentally the Bureau appraised the leased parcel referred to, supra, at $6,000. The lessees further testified they had no records of

the cash disbursed to decedent nor did they report said loan to the Internal Revenue Division in their tax returns.

Decedent's children and sister-in-law testified decedent could neither read nor write except to read numbers and write his own name. They further testified that decedent frequently gambled for money at poker.

In Clause No. I of the November 4, 1957, will, the testator declares that he is unmarried, his wife having died, although testimony elicited during the hearings establishes he lived openly as man and wife with Ellen Sarsarpkin for the last 20 years of his existence.

In Clause No II the testator disinherits his children declaring they had left him and had not left him their addresses or informed him of their whereabouts. Uncontradicted testimony elicited from the decedent's children and sister-in-law shows the children lived within close proximity of testator and constantly visited with him.

In Clause No III testator directs that all of his just debts be paid including one in the amount of $950 to Ben Sloan and Clint Lilly, representing certain advances made by them to testator.

In Clause No. IV the testator further declares:

> All the rest and residue of my estate, of whatever nature and extent I hereby give, devise, and bequeath to the said Ben Sloan and Clint Lilly; being, however, a power of appointment to dispose of said property as they may see fit. They may make any person, including themselves, the beneficiary, as they, in their uncontrolled discretion, see fit.

It appears that the basic issues before the Board are: 1) whether or not the instrument dated November 4, 1957, is in fact a will and 2) whether certain provisions contained in said instrument, after execution, require Secretarial approval in order to become valid.

No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his property, and, if testator's intention can be ascertained to a reasonable certainty from entire language of a will, such intention will be given effect even though language used by testator be informal or inartful and fails to employ apt legal words in designating a bequest or devise. See In re Lidston's Estate, 202 P.2d 259, 32 Wash.2d 408 (1949).

Extrinsic evidence is admissible, regardless of language of allegedly testamentary intention, to show absence of testamentary intention. See In re Tillman's Estate, 288 P.2d 892, 136 Cal. App. 2d 313 (1955).

Limitations prescribed by state law have no bearing on the validity of wills made by Indians in disposing of trust allotments or restricted personal property unless such provisions have been adopted in the regulations promulgated by the Secretary of the Interior respecting Indian wills. Estate of Ke To Sah Jefferson, IA-19 (May 4, 1950).

Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding. Estate of Mary Ursula Rock Wellknown, 1 IBIA 83, 78 I.D. 179 (1971).

The Act of June 25, 1910, 37 Stat. 678, sec. 2, as amended, 25 U.S.C. § 373 (1970), authorized an Indian allottee to devise by will property held in trust for said allottee; but the Act qualified this right of disposition by the following language:

> * * * Provided, however, that no will so executed shall be valid or ve any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, * * *.

The Act additionally provided that the approval of an allottee's will by the Secretary and the death of the allottee shall not operate to terminate the trust of the land.

Congress has thus entrusted the Secretary with the role of protecting Indians against alienation of their lands by either improvident inter vivos transactions of an allottee or his heirs or by improvident dispositions of allotted Indian lands by the will of the allottee.

The Act of June 25, 1910, 36 Stat. 857, sec. 5, 25 U.S.C. § 202 (1970) provides that:

> That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, * * *.

The general policy to keep Indian trust property in Indian hands is further exemplified by the Act of November 24, 1942, 56 Stat. 1021, 25 U.S.C. § 373 (1970), which provides that the trust or restricted estate of an Indian who dies intestate without heirs escheats, not to the state or to the United States, but to his tribe. Estate of Mary Ursula Rock Wellknown, supra.

Looking at the November 4, 1957, instrument, we find no specific devise to Ben Sloan or Clint Lilly or anyone else. We have only one other place to look for a clue and that is the residuary clause.

It appears from an examination of the residuary clause that this amounts to a general power of appointment, under which the executors Ben Sloan and Clint Lilly are directed, and therefore empowered to dispose of the estate, without limitation or restriction, and solely as their own discretion should dictate.

[1] A power of appointment is a power of disposition given to a person or persons over property not their own, by someone who directs the mode in which that power shall be exercised by a particular instrument. It is an authorization to do an act which the owner granting the power might himself by law fully perform. See In re Lidston's Estate, supra.

We are not concerned with the problem of nontrust property and the disposition thereof in a state probate proceeding. Such a power of appointment as applied to nontrust property in a state probate proceeding may very well have been sufficient to refute any contention of indefiniteness or enforcibility.

Here, we are dealing with a purported Indian will involving trust or restricted property. In other words property held in trust by the Secretary of the Interior for the benefit of an Indian ward.

Restrictions imposed on alienation of Indian land are not personal to the allottee but run with the land. See United States v. Reily, 290 U.S. 33, 54 S. Ct. 41 (1933).

We find that Clause IV amounted to a general appointment authorizing the lessees to act as executors of decedent's estate which involves only trust property.

[2] We find that such an appointment is a usurpation of power belonging only to the Secretary of the Interior bestowed upon him by Federal statute. We find that the November 4, 1957, instrument did not amount to a testamentary disposition of trust property but did amount to a written recognition by the decedent of a debt owed to the lessees in the amount of $950. We find that this debt is a valid claim against the decedent's estate.

We further find that the November 4, 1957, instrument did not revoke the previous will of March 11, 1953. The matter should be remanded for the purpose of probate of the March 11, 1953, will and for the incorporation of the $950 indebtedness referred to above in any future order and decree of distribution.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR

4.1, we REVERSE the Order Approving the November 4, 1957 will and Decree of Distribution dated April 30, 1975, for the reasons stated above, and REMAND the matter for consideration and probate of the March 11, 1953, will and related matters in keeping with applicable rules and regulations.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
Alexander H. Wilson
Chief Administrative Judge

//original signed
Wm. Philip Horton
Administrative Judge